



THE UPDATE

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ADJOURNMENTS - TEST TO APPLY - MATERIAL EVIDENCE - *DARVILLE*

R. v. Dang - Dec. 15, 2005 ABCA 441 per Conrad, Berger, Costigan, JA - Trial Judge: Sirrs, J:

Appeal from convictions for offences including conspiracy to traffic in cocaine. Trial involved a challenge to wiretap evidence. Defence sought to call a Crown employee in the wiretap voir dire to give evidence regarding disclosure issues. When the witness became unavailable, trial judge refused defence adjournment on the basis that the proposed evidence was not "essential".

Held: Appeal allowed, new trial.

An adjournment decision is discretionary. Error in principle must be demonstrated. First branch of *Darville* test requires that the missing evidence be material. "A requirement that the evidence must be essential puts the bars too high and is an error in principle."

R. Claus - Defence Counsel

CHARTER - 11(B) - SPEEDY TRIAL - IMPAIRED DRIVING - 31 MONTH DELAY - STAY

R. v. Nethery - Dec. 19, 2005 ABPC 343 per Allen, PCJ:

Impaired driving trial. *Askov* application. 31 month delay from date of offence to trial. Majority of delay caused by Charter applications necessitated by a number of disclosure difficulties, including the investigating officer having lost her notebook.

Held: Stay of proceedings.

Length of delay considered exceptional. Although the defence did not appear to have a "keen desire ... to procure an early trial date", no waiver of 11(b) established. No evidence of actual prejudice, but prejudice assumed. "The existence of the inference of prejudice drawn from a very long delay will safely preserve the pre-eminent right of the individual": *Askov* (1991), 59 C.C.C. (3d) 449 (SCC).

B. Gunn, S. Prithipaul -
Defence Counsel

INTERPRETER - CHARTER - 14 - TEST RE: QUALITY OF INTERPRETATION

R. v. A.F. - Dec. 19, 2005 ABCA 447 per Picard, Hunt, McMahon, JA - Trial Judge: Kenny, J:

Appeal from sexual assault conviction. Credibility based trial. Accused spoke Farsi, and the complainant spoke Vietnamese. Both parties testified through interpreters. Affidavits filed on appeal proved that some errors had been made by the trial translators.

Held: Appeal dismissed.

Although there were some errors with the translation, they did not touch on substantive issues. "An accused is entitled to continuous, precise, impartial and contemporaneous interpretation. The interpretation, however, need not be perfect. Any lapses must affect the vital interests of the accused, rather than mere collateral or extrinsic matters: *Tran* [1994] 2 S.C.R. 951.

J. Brunnen - Defence Counsel

SENTENCE - JOINT SUBMISSIONS - ERROR TO REJECT JOINT SUBMISSION IN APPROPRIATE RANGE

R. v. Brown - Dec. 15, 2005
ABCA 431 per Costigan, Sulyma, Verville, JA - Trial Judge: Wenden, PCJ:

Accused originally pled guilty to robbery, unlawful confinement and assault. Joint submission for 5 years jail minus pre-trial custody. Co-accused, sentenced before a difference judge, had received a 3 jail sentence minus pre-trial custody. Joint submission rejected, 10 year global sentence less pre-trial custody imposed.

Held: Appeal allowed, joint submission restored.

Trial judge erred in rejecting joint submission. Joint submission was within the range, albeit at the low end. Further, original sentence violated the parity principle. Although Brown was older than the co-accused, and was more involved, "these differences cannot support a disparity of nearly seven years in the sentences imposed."

L. Stevens - Defence Counsel



SENTENCE - ROBBERY - BANK ROBBERY WITH IMITATION FIREARM - 3 YEARS JAIL

R. v. Devanney - Dec. 22, 2005
ABPC 283 per Brown, PCJ:

44 year old accused with no record pled guilty to robbery and use of an imitation firearm while committing the robbery. Bank robbery. \$4800 taken. Offence motivated by accused's desperate financial circumstances. Positive PSR. Psychiatric evaluation rated accused as a low risk to re-offend. Money recovered. Defence sought conditional sentence.

Held: 3 years jail.

Conditional sentence unavailable. Minimum one year jail sentence for use of an imitation firearm in the commission of a robbery. 4 year starting point. Mitigating factors included: out-of-character nature of offence, guilty plea, co-operation with police. Authorities reviewed.

T. Pearse - Defence Counsel



WEAPONS - FIREARMS - DEFINITION - AUTOMATIC WEAPON - TEST TO APPLY

R. v. Sinclair - Dec. 20, 2005
ABCA 443 per Berger, Costigan, Ritter, JA - Trial Judge: Langston, J:

Crown appeal from acquittal on firearms charges. Issue as to whether trial judge erred in finding that 4 handguns sold by the accused had been "deactivated" at the time of sale. Trial judge did not make distinct findings with respect to each of the guns, rather he made one general conclusion that the guns could not be easily activated.

Held: Appeal allowed, new trial.

The word "capable" of being used as a "prohibited weapon" as defined by s. 84 CC, means "capable of conversion to an automatic weapon in a relatively short period of time with relative ease": *Hasselwander* [2005] 2 S.C.R. 398. Trial judge erred in not applying above definition to the 4 firearms individually, as opposed to drawing one general conclusion. "There are no legislated guidelines or regulations regarding deactivation; such a legislative gap accentuates the need for clear, articulated reasons relating to each individual count."

P. Royal - Defence Counsel



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